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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978.

No. 78-334

KENNETH F. FARE, ACTING CHIEF PROBATION OFFICER,

Petitioner,

vs.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 42 of the Supreme Court Rules. Letters of consent for us to file from counsel for the Petitioner and Respondent have been lodged with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The California District Attorneys Association (CDAA) is a non-profit, public service corporation, which is tax exempt under Section 501(c)3 of the Internal Revenue Code.

CDAA is composed of the state's 58 elected District Attorneys, several elected city attorneys principally engaged in the prosecution of criminal cases, and more than 1,400 prosecutors.

CDAA objectives:

1. To prepare and file Amicus Curiae briefs on important criminal justice issues before California and federal appellate courts.
2. To provide well-organized and effective legislative liaison and public education programs, to analyze and define criminal justice issues, to seek passage of comprehensive and productive laws and judicial reforms to enhance public safety, reduce crime, and preserve the civil liberties and rights of all citizens.

3. To provide legal research assistance to prosecutors in 42 California counties to oppose defense motions to dismiss charges, defense motions to change trial sites, defense writs (mandate, prohibition, habeas corpus) and defense motions to suppress evidence.
4. To reduce duplication of effort by prosecutors' offices throughout California by centralizing the generation of educational materials, training courses, and standards and procedures for use by prosecutors, defense judges, professors and law enforcement personnel.
5. To provide timely and accurate informational and ethical training materials to prosecutors on a regular basis, thus insuring the highest possible standards of professional competence and uniformity among prosecutors, and assisting in the administration of criminal justice.
6. To provide technical resources and clearinghouse services whereby managerial and administrative assistance can be mobilized and disseminated statewide.

Amici believe this case to be of particular importance because it involves a lower court interpretation of *Miranda* v. *Arizona*, 384 U.S. 486 (1966). Any decision of this Court which involves *Miranda* must, of necessity, impact upon every law enforcement officer in the nation. We believe that the expansion of *Miranda*, implicit in the lower court's opinion, is not mandated by this Court's prior rulings involving *Miranda*, nor by common sense or logic. Effective law enforcement will be ill-served if the ruling of the Supreme Court of the State of California is sustained.

ARGUMENT.

I. The Arbitrary Per Se Rule Regarding Confessions Which Was Created by Miranda v. Arizona Is Unrealistic and Lends Itself To Unwarranted Extensions of the Miranda Decision by Lower Courts.

It would be understatement to contend that the 5-to-4 majority holding in *Miranda* v. *Arizona*, 384 U.S. 486 (1966) was a controversial decision.[1] Indeed, the decision was born in controversy; seldom in the history of this Court have the opinions of the four dissenting Justices[2] been more trenchant.

Mr. Justice White, dissenting in *Miranda*, predicted its impact upon the enforcement of the criminal law:

> There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.
>
> I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.
>
> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain but a loss in human dignity. 384 U.S. at 542.

Now, some twelve years later, Justice White's prophetic statements have been echoed by California Supreme Court Justice Clark, dissenting in the instant case:

1. Likewise, we believe that it would be redundant to cite scholarly opinion and case law, *pro* and *con*, to this effect. Even a cursory study of the *Miranda* "fallout" in legal literature indicates that a mere footnote on the issue could well be longer than this entire brief.

2. Justices White, Stewart, Clark and Harlan.

> I . . . lament the fact that the majority free a confessed murderer. *In re Michael C.*, 21 Cal.3rd 471, 477, 146 Cal.Rptr. 358, 364, 579 P.2d 7, 13 (1978).

Few could quarrel with the intent and purpose of the majority Justices in *Miranda*. Their aim was to protect Fifth Amendment interests, as the majority Justices perceived them. The fundamental criticism of *Miranda* has been that, in attempting to effectuate their ends, the majority Justices painted with too broad a brush: they flew in the face of years of settled law that voluntariness—determined by the "totality of the circumstances"—was the proper standard for admissibility of confessions;[3] and they created a new and arbitrary *per se* rule of suppression which took no account of the vagaries and the realities of law enforcement work.

On the latter point, a very perceptive study of the United States Supreme Court was made by Mr. Fred P. Graham in his book, "The Self-Inflicted Wound."[4] The subject of this book was the Supreme Court under the Chief Justiceship of Earl Warren and the "self-inflicted wound" was the *Miranda* decision.

Mr. Graham, an attorney and former Supreme Court reporter for the New York Times,[5] is liberally-oriented and basically in agreement with the decisions of the "Warren Court" on criminal justice issues. With regard to the inflexibility of the *Miranda* opinion, however, he wrote:

> This was the core of the Supreme Court's difficulties over *Miranda*—In order to abolish the abuses that cropped up in some but by no means all police investigations, it would have to condemn the 'voluntariness' approach which the Court itself had always approved before and which the

3. "The *ipse dixit* of the majority has no support in our cases. Indeed the Court admits that 'we might not find the defendants' statements (here) to have been involuntary in traditional terms.' " 384 U.S. at 500, Clark, J., dissenting.

4. Graham, "The Self-Inflicted Wound," The McMillan Company, New York, 1970.

5. Mr. Graham is now the legal correspondent for a television network.

police saw as a reasonable way to do their job. If the Court were to frame a prophylactic procedure *rigid enough* to rule out all of the abuses that the voluntariness approach could permit, *it would also outlaw many instances of reasonable, noncoercive police inquiry about crime.*

* * * * *

Also, where the previous landmark decisions had imposed rigid but narrow restrictions on state officials' conduct, *Miranda* was to lay down a statute-like code of procedure consisting of four commandments, some of which included sub-commandments.

* * * * *

Despite the Court's zig zag course, its trend was clear; it would continue to cast about for an objective standard by which police questioning could be regulated *and if the standard proved so rigid that the police could not interrogate effectively at all, that would be a tolerable outcome in* (the majority of) *the Warren Court's eyes.* pp. 156-159 (emphasis supplied).

This, from a highly sympathetic commentator, indicates that the *per se*, prophylactic rule created by *Miranda* had some pitfalls built into it from the start. It was simply too arbitrary. Mr. Justice White, in his dissenting opinion, summed up this point:

> Much of the trouble with the Court's new rule is that it will operate *indiscriminately* in all criminal cases, *regardless of the crime or the circumstances involved.* 384 U.S. at 554 (emphasis supplied).

The opinion of the majority in *Miranda* bears out this contention. It was couched in terms of categorical imperatives, and contained no flexibility whatsoever. For example:

> [W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self incrimination is jeopardized. Procedural safeguards *must be* employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure the exercise of the right will be scrupulously honored the following measures are *required*. He *must* be warned prior to any questioning that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights *must* be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, *no evidence obtained as a result of interrogation can be used against him. 384 U.S. at 479* (emphasis supplied).

and:

> No amount of circumstantial evidence that the person may have been aware of this right will stand in its stead. 384 U.S. at 471-2.

The terms "must be," "required" and so on, coming as they did, from the highest Court in the nation brooked no abridgment.

Law enforcement, however, is a volatile business; no two cases are the same and no two f ctual situations are the same. Any *per se* rule, such as was imposed on the police by *Miranda*, is bound to come into conflict with the realities of day-to-day police work.

This Court, in its decisions subsequent to *Miranda*, has demonstrated considerable sympathy with this fact.[6] Mr. Justice Rehnquist, sitting as Circuit Justice for the Ninth Circuit, during the Court's 1978 Summer Recess, stayed the mandate of the California Supreme Court and noted probable jurisdiction in the instant case, in part because:

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6. See *e.g.*:- *Michigan* v. *Tucker*, 417 U.S. 433 (1974); *Michigan* v. *Mosley*, 423 U.S. 96 (1975); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977).

> Sensitive to the tension, and to the substantial burden which the original *Miranda* rules have placed on law enforcement efforts, this Court has consistently been reluctant to extend *Miranda* or to extend in any way its strictures on law enforcement agencies. ..... U.S. ..... at ....., 99 S.Ct. 3 at 5 (1978).

There remains, however, another *Miranda*—related problem for law enforcement officers, a problem which has been brought into sharp focus by this case. Because the *per se* rule enunciated in *Miranda* is so arbitrary and so inflexible, lower courts may feel compelled, or at least feel free, to expand on it as they wish, basing their holdings on their own interpretations of *Miranda*.

This problem was also addressed by Mr. Justice Rehnquist in his opinion staying the mandate in this case. Noting that supporters of *Miranda* have claimed that the very rigidity of that decision's *per se* rules have given the police and the courts clear-cut guidance in confession cases, he nevertheless stated:

> [T]his core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely augmented by other counts in the guise of 'interpreting' *Miranda*, particularly if their decisions evinced no principled limitations. ..... U.S. at ....., 99 S.Ct. at 5 (1978).

The expansion-of-*Miranda*-through-judicial-interpretation problem highlights the importance of this particular case, because this case not only presents this Court with the opportunity to put a brake on unwarranted extensions of *Miranda* by lower courts, but, affirmatively to add some more flexibility to the still-too-rigid *per se* rule enunciated in *Miranda*.

Certainly, the arbitrary dictates of the *Miranda* decision have led to some very questionable interpretations of that decision by lower courts. Cases abound in which confessions, which were by any reasonable and objective standard voluntarily made, have been suppressed and patently guilty individuals were freed, or had their convictions reversed. A few examples of this will suffice:

1. *Commonwealth* v. *Singleton*, 439 Pa. 185, 266 A.2d 753 (1970). Defendant confessed to, and was convicted of, murder in the beating death of his mother, sister and grandmother. The court noted that the commonwealth's case consisted primarily of defendant's incriminating statements; however, his statements were nullified and his conviction was reversed. The defendant had been given the proper *Miranda* warnings in every respect except that he was advised that anything that he said could be used "for or against" him. The court held that the use of the single word "for" vitiated the entire confession under the *Miranda* holding.

2. *Commonwealth* v. *Davis*, 440 Pa. 123, 270 A.2d 199 (1970). Again the court reversed a first degree conviction for robbery—murder because the word "for" was included in otherwise satisfactory warnings.

3. *Biggerstaff* v. *State*, 491 P.2d 345 (Okla.App. 1971). The defendant, convicted of first degree murder, had been given *Miranda* warnings which were satisfactory in all respects except that he was advised that he was entitled to an attorney "at any time." The court found this warning to be insufficient advice to the suspect that he had a right to the presence of an attorney during questioning. It cited a similar holding by the United States Court of Appeals for the Fifth Circuit in *Atwell* v. *United States*, 398 F.2d 507 (1968). The court in *Atwell* rejected the use of the words "at any time," stating: " 'Any time' *could* be interpreted by the accused in an atmosphere of pressure from the glare of the law enforcer and his authority, to refer to an impending trial or event other than the moment the advice was given and the interrogation following." 398 F.2d at 510 (emphasis added).

   The court in *Biggerstaff* also noted that, absent the defendant's confession, which had been ruled inadmissible, the evidence was not sufficient to sustain a conviction for the crime of murder.

4. *Scott* v. *State*, 251 Ark. 918, 475 S.W.2d 699 (1972). In reversing the defendant's conviction for the rape of a two-year-old girl, the court noted in this case that

there were no eyewitnesses to this crime as the victim was too young and the only other witness, her father, had been killed in an automobile accident. Defendant was properly advised and refused to make a statement. Then, according to the court: "About three months later a deputy sheriff who was passing the cell where Scott was confined asked him, in the course of what appears t. have been a bantering conversation, if he had raped the little girl. Scott replied, 'yeah.'" 475 S.W.2d at 701. This statement was held invalid as not being voluntarily made under *Miranda* and the rape conviction was reversed.

5. *United States* v. *Millen*, 338 F.Supp. 747 (E.D.Wisc. 1972). Defendant was a practicing attorney who caused a package of hashish to be mailed to himself at the office of the law firm for which he worked. Federal agents observed him receive the package and later arrested him. Defendant, after being given the *Miranda* warnings by a federal agent, made inculpatory statements and told the agent where the package was located in his office. Despite the fact that defendant was a *practicing attorney*, his conviction was reversed because the court found that he had not sufficiently waived his rights under *Miranda*, and the court suppressed physical evidence in the case, in part because it was located through defendant's statements.

6. *DuPont* v. *United States*, 259 A.2d 355 (D.C.Cir. 1969). A Washington, D.C. police officer received information that defendant had a machine gun concealed in his bed in a girl's apartment. After receiving from the girl a valid consent to search her apartment, the officer seized the machine gun from the defendant's bed. Defendant was arrested. At the police station the arresting officer called defendant's attention to a large sign on the wall containing the *Miranda* warnings. Defendant refused to look at it. Later a Sergeant Evanoff interrogated defendant. He attempted to give defendant the *Miranda* warnings, but defendant cut him off stating, "I know my rights, man," and, according to the court, defendant indicated: ". . . that Sgt. Evanoff didn't have to go into that." Again defendant

did not look at the card on the wall. Thereafter, defendant made inculpatory statements exonerating the girl in whose apartment the gun was found, called his attorney, and then made further inculpatory statements. The court suppressed all of the defendant's statements as violative of *Miranda*.

Cases such as these are at the core of the problems, created by *Miranda*, for law enforcement officers. In none of the cases noted above could the police interrogation be considered physically or psychologically coercive; the factual guilt of the defendants was not in doubt; yet their convictions were reversed based upon the lower courts' interpretations of *Miranda*.

If we make the rather safe assumption that appellate courts in general do not *want* to reverse the convictions of factually guilty criminals, the only rational conclusion which can be drawn is that those courts felt *compelled* to rule as they did because of the *per se* rule created by *Miranda*.

We acknowledge that the cases which we have described were decided before this Court's decision in *Oregon* v. *Hass*, 420 U.S. 714 (1975). That case held that a state court may not impose greater *Miranda* restrictions, as a matter of their interpretation of federal constitutional law, when this Court "specifically refrains" from imposing them.

Thus it might be argued that, in view of current *Miranda*-related decisions made by this Court, there is little likelihood that lower courts will utilize the interpretation process to expand *Miranda* beyond its original bounds. We submit, however, that this may not be the case for the following reasons.

First, *Oregon* v. *Hass*, prohibits state expansions of *Miranda* only in those cases in which this Court has *specifically refrained* from extending them. Thus, that case would appear to have little effect in *Miranda*-related cases in which this Court has not definitively spoken. For example, this Court has not construed such words of art as "anything you say can be used *for or against you*" (see: *Commonwealth* v. *Singleton*, 439 Pa.

at 186, 266 A.2d at 754) or that a suspect can consult with an attorney "at any time" (see: *Biggerstaff* v. *State*, 491 P.2d at 351); and it is at least questionable that such lower court interpretations of *Miranda* would be covered by *Oregon* v. *Hass*.[7]

Additionally, the sheer volume of cases which this Court is requested to hear obviously prevents many such cases from being reviewed by the Court. As Mr. Justice Rehnquist noted in his opinion staying the mandate in this case:

> This Court is tendered many opportunities by unsuccessful prosecutors and unsuccessful defendants to review rulings predicated on *Miranda* and related cases, and, as with many issues that recur in petitions before this Court, we decline most such tenders. ..... U.S. at ....., 99 S.Ct. at 5 (1978).

For the foregoing reasons, we suggest that, despite the holding in *Oregon* v. *Hass*, it is still necessary for this Court, in cases such as this, to address itself directly to the questions of the expansion of the *Miranda* doctrine.

It is, of course, a matter of basic constitutional law that a state supreme court can restrict the powers of law enforcement officers to a greater extent than this Court has done, *provided* that such decisions are based upon interpretations of *state* constitutional or statutory provisions. *California* v. *Krivda*, 409 U.S. 33 (1972); *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). This is simply not the case here, however; the decision below was based on the California Supreme Court's interpretation of the Federal Constitution.[8]

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7. *Oregon* v. *Hass*, involved the use of statements taken in violation of *Miranda* to impeach a defendant's credibility at trial. This Court had "specifically" held such statements to be admissible in *Harris* v. *New York*, 401 U.S. 222 (1971).

8. "The decision of the California Supreme Court was clearly premised on the Federal Constitution. It is posited as an extrapolation of *Miranda* and there are no references to state statutory or constitutional grounds." *Fare* v. *Michael C.*, ... U.S. at ....., 99 S.Ct. at 4 (1978), Rehnquist, J., sitting as Circuit Justice.

Thus in this case, this Court is squarely presented with the question whether *Miranda's* dictates should be expanded to equate a request by a murder suspect to speak with his probation officer to an invocation of his Fifth Amendment privilege, thus foreclosing further questioning of that suspect. For the reasons set forth in the next section of this argument we submit that *Miranda* should not be so expanded.

II. The Tortured Interpretation of Miranda, Made by the Lower Court in This Case, Demonstrates the Necessity for This Court to Define a More Flexible Standard for Lower Court Interpretations of Miranda Related Cases.

The Supreme Court of California went far beyond the language and the intent of the majority opinion in *Miranda* v. *Arizona*. That opinion dealt with the Fifth Amendment right of criminal suspects not to incriminate themselves and it made it very clear that the best way to ensure those rights was to have an *attorney* present during questioning if the suspect desired one. As Mr. Justice Rehnquist noted in his opinion staying the mandate in this case:

> The special status given legal counsel in *Miranda's* prophylactic rules is related to the traditional role of *an attorney* as expositor of legal rights and their proper invocation. He is also the principal bulwark between the individual and the state prosecutorial and adjudicative system. ..... U.S. at ....., 99 S.Ct. at 6 (1978) (emphasis added).

Even the most vociferous critics of the *Miranda* decision would be hard put to contest the notion that if a criminal suspect asks to consult with an attorney he should be accorded that right. *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). This is as it should be, because, under our system of justice, attorneys are recognized as being those who are best qualified to advise suspects of their rights.

Miranda dealt with the right of the suspect to consult an *attorney*. It made no proviison for the right of a suspect to

consult any other class of advisors. Other persons might or might not be able to advise a suspect in his best interests. For example, the Oklahoma Court of Criminal Appeals recently held that it was improper for the *father* of a juvenile suspect to purport to waive his son's right to have an attorney present during questioning.[9] In this case, at least, advice from a parent was found to be legally flawed and not in the suspect's best interest.

As noted above, the majority in *Miranda* seemed principally concerned with furnishing the suspect with a *lawyer* (and only a lawyer) in order best to protect that suspect's *legal* rights. In this case, however, the California Supreme Court, interpreting *Miranda,* has escalated the constitutional requirement that a request for *legal counsel* must be honored to a point whereby a suspect's request to consult with his *probation officer* triggers the Fifth Amendment privilege.

The lower court appeared to base its holding on two theories: first, that the purpose of juvenile probation officers in California is to "represent the interests" of the juvenile,[10] and therefore probation officers are somehow cloaked with the protective characteristics of attorneys; and, second, that in any event, the murder suspect's request to speak with the probation officer was a "call for help" indicating that he did not wish to speak with the police.

The first of the theories relied on by the lower court can best be described as specious. We submit that it falls within the category of cases, described by Mr. Justice Rehnquist in his opinion staying the mandate in this case, as being an interpretation of *Miranda* which ". . . evinced no principled limitations," ..... U.S. at ....., 99 S.Ct. at 5 (1978).

Probation officers are peace officers under California law, employed by the state, and in the final analysis their duty is to

9. *MDG* v. *State*, Okla.Ct.Crim.App., 24 Cr.L. 2079 (9/26/78).
10. Cal. Welf. & Inst. Code (No. 280).

the state. As Justice Stanley Mosk noted in his concurring opinion in this case:

> Where a conflict between the minor and the law arises, the probation officer can be neither neutral nor in the minor's corner. 21 Cal.3rd at 476, 146 Cal.Rptr. at 363, 579 P.2d at 12.

The result reached by the California Supreme Court is made even more anomalous when it is considered that the supreme court of another state has ruled that a parole officer (who is in roughly the same position to his ward as is a probation officer) *is,* in fact, a law enforcement officer for purposes of *Miranda* and must give the required warnings if he is interrogating a suspect.[11]

The lower court's rationale in this case, if taken to its logical conclusion, would dictate that a suspect has invoked his privilege if he asked to speak to a police detective who also happened to be a close friend.

The California Supreme Court's "call for help" theory also merits discussion. Under this novel rationale, a suspect who requests to speak to almost *anyone* during custodial interrogation could be held to have invoked his privilege. In fact, the State of California raised this issue in the lower court, contending, with considerable logic, that a request by a suspect to see his clergyman, music teacher or his football coach, could not be distinguished from a request to consult his probation officer.

The California Supreme Court rejected this contention out of hand (21 Cal.3rd at 474, 146 Cal.Rptr. at 361, 579 P.2d at 10), but we suggest that it has merit. The process of arrest or detention and interrogation about a serious crime is, concededly, traumatic. The suspect could "call for help" by asking to speak to any number of persons with whom he is close: a spouse, boyfriend/girlfriend, even an old army buddy; but the question remains, should this be considered as invoking the privilege against self-incrimination?

11. *Gallagher* v. *Ohio*, 38 Ohio St. 291, 313 N.E.2d 396 (1976).

We think not. *Miranda* speaks in terms of the right to consult an *attorney*. It did not create an entire class of surrogate-attorneys consisting of anyone with whom the suspect happens to have a special rapport. Any such holding would expand the *Miranda* doctrine even beyond the intentions of the authors of that doctrine.

In concluding our argument we return to our contention that *per se* rules can only have a detrimental effect on law enforcement; and the instant case illustrates this point clearly. The lower court devised a new, judicially created *per se* rule in this case. Although requested by the State of California to consider the totality of the circumstances in the factual setting surrounding the confession in this case, the lower court expressly refused:

> Here, however, we face conduct which, regardless of *capacity, coercion or voluntariness, per se* invokes the privilege against self-incrimination. 21 Cal.3rd at 475, 146 Cal.Rptr. at 362, 579 P.2d at 10 (emphasis added).

Thus, despite the fact that the suspect, after being fully advised of his rights under *Miranda*, and after his request to see his probation officer was refused, stated, unequivocably: "Yeah, I want to talk to you (the police officer)" 21 Cal.3rd at 473, 146 Cal.Rptr. at 360, 579 P.2d at 8, his confession was suppressed by the lower court.

We submit that this case presents a classic example of every point that the critics of the inflexibility of *Miranda* have raised:

1. There was no coercive activity by the police, either physically or psychologically;
2. The suspect stated expressly that he was willing to talk to the police;
3. The suspect confessed, voluntarily, to a serious crime: murder;
4. He was convicted by a trial court and his conviction was upheld by a unanimous California Court of Appeals;
5. There is nothing in the record on appeal which casts the slightest doubt on Michael C.'s factual guilt.

Yet the California Supreme Court, purporting to interpret federal constitutional issues, created a *per se* rule, that a request by a suspect to consult with his probation officer *automatically*, and without consideration of any other circumstances, invoked the Fifth Amendment privilege; his confession to the crime of murder must be suppressed, *and, in all likelihood the murderer must be freed.*[12]

Herein lies the problem: *Miranda* created its own *per se* rule regarding the admissibility of confessions and the lower court, relying on its own "interpretation" of *Miranda* created yet another *per se* rule. It is inflexibility compounded upon inflexibility, and simple justice is perverted.

This case could well be a vehicle for this Court to enunciate a rule of reason for lower courts to follow in *Miranda*-related cases. We submit that this should be done and we can suggest no better rule than that suggested by the late Justice Tom C. Clark in his dissenting opinion in *Miranda* v. *Arizona*:

> Under the 'totality of circumstances' rule . . . I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of counsel the burden would be on the state to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary. 384 U.S. at 503.

For the foregoing reasons we urge this Court to reverse the judgment of the Supreme Court of the State of California.

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12. "The Court of Appeals observed that without the confession the balance of the evidence is insufficient to sustain the conviction." *In re Michael C.*, 21 Cal.3rd at 477, 146 Cal.Rptr. at 364, 579 P.2d at 13, footnote 2, Clark, J., dissenting.

CONCLUSION.

This Court, in recent years, has limited *Miranda* to its specific holding, and has not mandated *per se* rules involving confessions and admissions. The lower court in this case created a new and inflexible *per se* rule which goes far beyond the letter and spirit of *Miranda*. We suggest that the ruling of the Surpeme Court of the State of California is not constitutionally warranted and we respectfully urge this Court to reverse.

Respectfully submitted,

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